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No. 92-351

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

LEONARD E. HELLER, Secretary,
KENTUCKY CABINET FOR HUMAN
RESOURCES - - - - - - - - Petitioner

versus

SAMUEL DOE, by His Mother and
Next Friend, MARY DOE, Et Al. - Respondents

**On Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit**

REPLY BRIEF FOR PETITIONER

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v.

SAMUEL DOE, by His Mother and Next Friend, MARY DOE, Et Al. - - - - - - - *Respondents*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

ARGUMENT

1. The Issue Concerning Voluntary Admission of Mentally Retarded Persons to State Operated ICF/MR Facilities Upon the Substituted Consent of Their Legal Guardians Is Properly Before the Court.

For more than 10 years now, the parties to this proceeding have been litigating the procedures which are constitutionally required before mentally retarded persons in Kentucky may receive habilitative services from the Intermediate Care Facilities for the Mentally Retarded (ICF/

MR's) operated by the Kentucky Cabinet for Human Resources (CHR).

In the four years preceding the filing of the complaint in this proceeding, Doe's counsel and petitioner litigated the issue of whether the Constitution and federal law prohibited CHR from constructing or operating residential facilities for the mentally retarded. *See Kentucky Association for Retarded Citizens* v. *Conn*, 510 F. Supp. 1233 (W.D. KY 1980), aff'd 674 F.2d 582 (6th Cir. 1982). That litigation having been resolved in favor of permitting CHR to continue to construct and operate residential facilities for the care of the mentally retarded, the focus of litigation apparently shifted toward making it as difficult as possible for CHR to utilize those facilities.

The paramount issue throughout the course of the instant litigation, however framed for purposes of argument, has been: What procedural hoops and hurdles must the state place in the path of legal guardians for the mentally retarded who believe that the health, safety and welfare of their wards require that habilitative services be provided to their wards in a residential setting?

In the previous litigation, the District Court had held that the decision to place or retain a mentally retarded individual in a residential facility "should be left to a decision-maker such as the interdisciplinary team rather than in the hands of a court or court-appointed official." *Kentucky Association for Retarded Citizens* v. *Conn*, 510 F. Supp. 1233, 1249 (W.D. KY 1980).

The same determination was contained in the District Court's initial Memorandum Opinion in the instant litigation. (R. 106, pp. 10-12). However, the District Court subsequently determined that additional procedural protections were required by the Due Process and Equal Protection Clauses. (R. 117, pp. 4-5; R. 126, pp. 7-8).

The Kentucky General Assembly was then put to the task of designing a set of procedures for commitment of the mentally retarded to CHR's residential facilities patterned sufficiently like the Commonwealth's procedures for involuntary hospitalization of the mentally ill as to meet the anticipated Equal Protection challenges.

CHR's admission practices were thus transferred from a medical model based upon consideration and determination by qualified mental retardation professionals empowered by a court authorized fiduciary for the mentally retarded person to a judicial model based upon adversary proceedings and determined by lay jurors.

The issues presented herein are whether the judicial model is constitutionally required for the admission to a residential facility of mentally retarded adults who have insufficient mental capacity to provide their own informed consent to admission and, if so, whether Kentucky has provided adequate procedures for the court-mandated adversary proceedings.

Resolution of the threshold issue is of critical importance to the States that allocate significant public resources to the provision of services and programs for the mentally retarded, the professionals who operate such programs and to the families and legal guardians of the mentally retarded who are morally and legally responsible for their physical, mental and emotional well-being.

This issue, whether discussed in terms of admissions made voluntary by substituted consent or admissions based upon the medical model, transcends and is incorporated within every other issue presented herein.

2. The Rational Basis Standard Provides the Appropriate Level of Scrutiny for Equal Protection Review of State Legislation Containing a Classification of Individuals Based Upon the Condition of Mental Retardation.

City of Cleburne, Texas v. *Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), contains a detailed analysis of the factors considered by this Court in determining the appropriate level of scrutiny to be applied to State legislation treating people differently based upon the classification of mental retardation.

Cleburne observed that the mentally retarded are immutably different from other individuals and that the States have a legitimate interest in dealing with and providing for them. *Id.* 473 U.S. at 443. State and Federal legislators have been responsive to the plight of the mentally retarded by adopting legislation outlawing discrimination and mandating appropriate treatment, services, education and habilitation. *Id.* 473 U.S. at 444-445. The legislative response to the plight of the mentally retarded indicates that the retarded possess broad-based public support and political power in the legislative process. *Id.* 473 U.S. at 445. Moreover, the mentally retarded represent a large and amorphous class which makes application of increased levels of scrutiny awkward and inappropriate. *Id.* 473 U.S. at 446.

After reviewing the foregoing factors, *Cleburne* held that the mentally retarded would not be considered a quasi-suspect class and that state legislation distinguishing the mentally retarded from others would withstand Equal Protection review if the legislation was rationally related to a legitimate government purpose. *Id.* 473 at 447.

Respondents now assert that the passage of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213, was tantamount to a legislative overruling of *Cleburne*'s analysis of the status of the mentally retarded for Equal Protection review. Respondent's Brief, pp. 27-32.

No part of the legislative history of the ADA relied upon by Respondents establishes any Congressional intent to overrule *Cleburne*'s analysis of the issue. Reliance upon the passage of the ADA as requiring a higher level of scrutiny for the mentally retarded is somewhat suspect in view of the fact that the mentally retarded constitute but a small segment of the persons with disabilities receiving protections under the Act. 42 U.S.C. § 12102(2).

Passage of the ADA with its widespread consequences would appear to strengthen *Cleburne*'s observation that the mentally retarded are not politically powerless. This observation was also demonstrated in passage of the Rehabilitation, Comprehensive Services and Developmental Disabilities Act of 1978, Pub. L. 95-602; and the Civil Rights of Institutionalized Persons Act of 1980, 42 U.S.C. § 1997, et seq., in addition to the legislation cited in *Cleburne*.

At the state level, the Commonwealth of Kentucky has created a Department for Mental Health and Mental Retardation Services to administer state programs for the mentally ill and the mentally retarded. KRS 194.030(9). A separate and independent Department of Public Advocacy has also been created to pursue all legal, administrative and other appropriate remedies to insure protection of the rights of the developmentally disabled. KRS 31.010.

The manifest purpose behind most, if not all, of the legislation singling out the mentally retarded is to bestow

a perceived benefit upon this clearly distinguishable segment of society. A higher standard of review of State legislation could easily penalize the retarded by depriving them of these substantial benefits.

Petitioner respectfully submits that this Court's analysis of the plight of the mentally retarded set forth in *Cleburne* has proven to provide the appropriate balancing of the various factors to be considered for purposes of the Equal Protection clause and there is no legitimate reason to heighten the level of scrutiny applied to State legislation affecting the mentally retarded.

3. The Participation of the Legal Guardians and Immediate Family of the Mentally Retarded in the Involuntary Commitment Process Does Not Deprive the Retarded of Due Process.

The procedures adopted by Kentucky for the involuntary commitment of mentally retarded persons to residential facilities operated by CHR are part of a continuum of services provided to the retarded in the Commonwealth.

Mentally retarded persons do require specialized education, training and care. *Halderman* v. *Pennhurst State School and Hospital*, 610 F.Supp. 1221, 1223 (D.C. PA 1985). The focus of this specialized care, called habilitation, is upon training and development of needed skills. *Youngberg* v. *Romeo*, 457 U.S. 307, 320 n.1, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). Although there is significant disagreement on the subject, *see Id.* 457 U.S. 317, n.20, the prevailing view among professionals is that the level of functioning, i.e., lessening of dependence upon others, of every retarded person may be improved by proper habilitation. *Halderman*, 610 F. Supp. at 1223.

The skills acquired by habilitation are not learned permanently by the retarded. *Philadelphia Police and Fire Assoc. for Handicapped Children, Inc.* v. *City of Philadelphia*, 874 F.2d 156, 158 (3rd Cir. 1989). Cessation of habilitation is followed by regression in basic living skills. *Id.* at 158. Regression in such skills equates to an increased dependence upon others.

The issue for the mentally retarded person is not whether he or she will receive habilitation services. Receipt of such services has been determined to be necessary for the retarded if not an enforceable right. *Halderman* v. *Pennhurst State School and Hospital*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981).

The vast majority of mentally retarded persons receive such services while living in their homes. Services made available in the community through state agencies like CHR permit 97 to 98 percent of the retarded to remain in the community. (R. 34, p. 28). Those persons whose level of retardation and familial support make living at home impractical may find appropriate living arrangements in state-funded group homes or other living arrangements designed for the retarded. A small percentage of the retarded, made up mostly of persons suffering from severe and profound retardation, cannot obtain adequate services at home or in the community and are thus referred to residential facilities operated by CHR.

Placement in one of CHR's facilities is not considered a permanent placement. The facility must discharge any resident whose care and treatment in an ICF/MR is no longer necessary, KRS 202B.021(3), KRS 202B.170(2), KRS 202B.240(2), i.e, a less restrictive placement for receipt of habilitation services is available.

The decisions of the District Court and Sixth Circuit herein require that any mentally retarded adult admitted to one of CHR's facilities who is not competent to secure his own admission be admitted utilizing involuntary commitment procedures similar to those utilized for involuntary hospitalization of the mentally ill. These procedures require a judicial determination that: i) the person is mentally retarded; ii) the person presents a danger or threat of danger to self, family, or others; iii) the least restrictive alternative mode of treatment presently available requires placement in an ICF/MR; and iv) treatment that can reasonably benefit the person is available in an ICF/MR. KRS 202B.040.

A verified petition seeking such determination may be filed in a state district court. KRS 202B.100. Unless the petitioner is a qualified mental retardation professional, the court must examine the petitioner under oath to determine whether probable cause exists to continue with the proceeding. KRS 202B.100(5). If probable cause to proceed is found, the court must schedule a preliminary hearing and notify the respondent, his legal guardian and the respondent's spouse, parents or nearest relative about the contents of the petition and the date, time and purpose of the preliminary hearing. KRS 202B.100(6).

The court must also cause the respondent to be immediately examined by two qualified mental retardation professionals, at least one of whom is a physician, who must examine the respondent and certify their findings to the court within 24 hours, exclusive of weekends and holidays. KRS 202B.100(6)(c). The proceeding must be immediately dismissed unless the qualified mental retardation professions certify to the court that the respondent satisfies the

criteria for involuntary admission set forth above. KRS 202B.130.

The respondent in the involuntary commitment proceeding has a right to court appointed counsel, KRS 202B.210, the right to be present in person and by counsel at all hearings, KRS 202B.220, the right to present testimony, testify personally and to cross-examine all witnesses, KRS 202B.160(2), the right to a jury trial, KRS 202B.160(2), and the right to appeal the decision of the district court to the state circuit court. KRS 202B.230.

The Commonwealth has the burden of proving each of the criteria for involuntary admission by clear and convincing evidence. KRS 202B.160(2).

A judicial determination that the respondent satisfies the criteria for involuntary admission made pursuant to the involuntary commitment procedure does not guarantee admission to an ICF/MR. The ICF/MR may refuse to admit the respondent if it does not have appropriate programs and space available. KRS 202B.200(2).

If the respondent is admitted to an ICF/MR as a result of the involuntary admission procedure, the appropriateness of the respondent's continued residency is reviewed at least annually by the facility's interdisciplinary team. KRS 202B.240(1). The respondent must be discharged by the facility if the interdisciplinary team determines that the respondent no longer meets the criteria for involuntary admission. KRS 202B.240(2).

The respondent's continued residency in an ICF/MR is also reviewed by the committing district court at intervals of no more than five years. KRS 202B.250(1). In these judicial review proceedings the respondent is entitled to

advance notice, appointed counsel, the ability to present evidence and to cross-examine witnesses. KRS 202B.250(1) & (2). Should the court find that the respondent no longer satisfies the criteria for involuntary admission, the respondent must be discharged. KRS 202B.250(3).

If, at any point during the respondent's residency in an ICF/MR, it appears that the respondent no longer meets the criteria for involuntary admission, the respondent, his guardian, family member or attorney may petition the court for an immediate review of the residential placement. KRS 202B.250(4).

The unwarranted admission of a mentally retarded person to one of CHR's facilities is a criminal offense punishable by a fine not exceeding $ 5,000.00 and imprisonment for a term not exceeding five years. KRS 202B.990.

The challenged involuntary commitment procedure recognizes that the persons who would otherwise be responsible for meeting the daily living needs of the retarded person, i.e., legal guardians and immediate family, also have an interest at stake in the commitment proceeding. These other interested parties are specifically permitted to employ expert witnesses, KRS 202B.140, attend all hearings, participate as a party, employ counsel, KRS 202B.160(3), appeal any adverse decision, KRS 202B.230, and seek immediate judicial review of the necessity for continuation of the involuntary commitment at any point during the commitment. KRS 202B.250(4).

Petitioner respectfully submits that the procedures described above accord the mentally retarded who become subject to the involuntary commitment process with all of the procedures required in *Vitek* v. *Jones*, 445 U.S. 480, 495-496, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980).

Moreover, the involuntary commitment procedure adopted by Kentucky represents a fair balancing of the affected private interests, the risk of erroneous deprivation of such interests through the procedures used, the probable value of additional substitute procedural safeguards, and the Commonwealth's interest. *See Parham* v. *J.R.* 442 U.S. 524, 600-601, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979).

The mentally retarded person who has been examined by two qualified mental retardation professionals who both certify that he or she satisfies the criteria for involuntary commitment has an identified need for a level of care that is not available in a community setting. The persons responsible for the care of the respondent, i.e., legal guardian and immediate family, have a legal and moral duty to see that adequate care is provided to meet the needs of the respondent.

All reasonable possible procedural safeguards are contained in the Commonwealth's procedures except for the "beyond a reasonable doubt" standard of proof which this Court has previously determined to be an inappropriate standard in civil commitment proceedings. *Addington* v. *Texas*, 441 U.S.418, 429-430, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). Additional procedures would not likely serve to reduce the risk of an erroneous decision.

The only interest impinged by the Commonwealth's involuntary commitment procedures is the interest of the Commonwealth. The procedures now contained in KRS Chapter 202B are expensive, time consuming, and divert a significant portion of the public funds which could otherwise be utilized to provide habilitation services to the retarded.

Although the procedures seem needlessly cumbersome, they do provide adequate protection against placement of a mentally retarded person in an ICF/MR who could survive in a less restrictive setting.

4. The Procedures Adopted by Kentucky for the Involuntary Commitment of the Mentally Retarded to Residential Facilities Operated by CHR Do Not Violate Equal Protection.

The District Court has made no finding of facts in this litigation concerning the evidence presented by the parties describing the differences between the mentally retarded and the mentally ill. The specific characteristics of each group relied upon by Petitioner to satisfy Equal Protection review are those characteristics previously recognized by this and other federal courts and so clearly established as to be proper subjects for judicial notice.

Distinguishing between the two groups has not been difficult. However, Petitioner has fallen short of the lower courts' demand that he demonstrate a difference between the mentally retarded and the mentally ill that is rationally related to the purposes of their commitment. *Doe* v. *Austin*, 965 F.2d 109 (1992) (J.A., p. 175).

Prior to the institution of this litigation, CHR did not consider the residents of its ICF/MRs as being "committed" because nearly all residents had been voluntarily admitted upon the substituted consent of their parents or legal guardians. CHR did not realize, until informed by the District Court, that providing a haven of care for mentally retarded persons who could not be cared for in their homes or in their community was an involuntary confinement of the retarded.

The voluntary/medical admission process previously utilized by CHR for admission to its ICF/MRs did not label residents as delinquent, criminal or mentally ill and possibly dangerous, and could not thus generate the stigma and community reaction equated with involuntary hospitalization at a state mental hospital. *See Parham* v. *J.R.*, *supra*, 442 U.S. at 601. There was no showing of any stigma attached to a voluntary admission to an ICF/MR below.

CHR recognized that the residents of its ICF/MRs were, due to their low level of functioning, mentally incapable of expressing a will to leave the residential facilities and often physically incapable of moving at all. (R.69, pp. 4-5). CHR believed that if the mentally retarded were, in any usual sense of the word, "confined" to their ICF/MRs, their confinement was a result of their condition of severe or profound retardation and not as a result of any act of CHR which simply provided facilities for those who could not receive adequate care elsewhere.

It is true that admission to an ICF/MR will, for some, become a long term if not permanent placement. Respite placements of up to 30 days duration without institution of the involuntary commitment procedures contained in KRS Chapter 202B were approved by the respondents and District Court below. (R. 133). The duration of admissions for the retarded can be contrasted with the average hospital stay for psychiatric patents in state mental hospitals of 13.1 days. *Mental Health Weekly*, Vol. 2, No. 11, "Psychiatric Length of Stay by Diagnosis" (1990).

However, the purpose of CHR's operation of its ICF/MRs is not to provide a warehouse for the retarded. The Commonwealth has expended substantial funds to see that all residents of ICF/MRs receive necessary habilitation ser-

vices. The funds invested in habilitation services in ICF/MRs are justified by the increased independence of the retarded and the decreased cost of providing for their care.

This cost decreases significantly when an ICF/MR resident gains sufficient basic living skills to return to his home or community placement. The periodic administrative reviews conducted within the ICF/MR are designed to determine which residents no longer require residential care. The discharge of such residents creates vacancies for others and permits CHR to meet the residential care needs of the retarded within the Commonwealth with less than 1,000 beds.

The lower courts' mandate that Kentucky treat its mentally retarded with essentially the same procedures provided to its mentally ill has permitted Respondents to successfully argue herein that the Constitution prohibits a person from receiving services from an ICF/MR even though he has been certified by qualified mental retardation professionals as i) being retarded, ii) presenting a danger to himself or others and iii) being unsuitable for a placement any less restrictive than that provided in an ICF/MR; and the Commonwealth has established each of the foregoing factors for involuntary admission in an adversary judicial proceeding by clear and convincing evidence.

Petitioner respectfully submits that the clearly wrong result reached below was due to an improper Equal Protection analysis. The lower courts have failed to recognize that the clear differences between the mentally retarded and mentally ill permit, if not require, the States to tailor the procedures for admission to residential facilities to address the specific needs and interests of each of these clearly distinguishable segments of society.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests that the Opinions of the Court of Appeals be reversed.

Respectfully submitted,

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